LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 4 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1965

No. 542

BENJAMIN PISANO,

Petitioner,

against

S.S. BENNY SKOU, her engines, boiler, tackle, etc., in rem, and OVE SKOU, D/S OVE SKOU A/S, and D/S af 1937 A/S,

Respondent,

against

JOHN T. CLARK & SON,

Respondent-Impleaded.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, OVE SKOU, D/S OVE SKOU A/S, AND D/S AF 1937 A/S IN OPPOSITION

J. WARD O'NEILL,
DAVID P. H. WATSON,
Counsel for Respondent, Ove Skou, D/S Ove Skou A/S, and D/S af 1937 A/S,
80 Broad Street,
New York, N. Y. 10004

ROBERT K. MARZIK,
of Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of Facts	2
ARGUMENT:	
There Is No Conflict of Decision	5
There Is No Important Question of Federal Law	8
The Decision Below Is Clearly Correct	9
Conclusion	12

Table of Cases Cited

Brabazon v. Belship Co., Ltd., 202 F. 2d 904 (3 C. A. 1953)	6
Connolly v. Weyerhaeuser Steamship v. Nacierema Operating Co., Inc., 236 F. 2d 848 (2 C. A. 1956)	7
Crumady v. Joachim Fisser, 358 U. S. 423 (1959)	8
Ferrante v. Swedish American Lines, 331 F. 2d 571 (3 C. A. 1964)	6
Gruja v. United States Lines Company, 337 F. 2d 375 (2 C. A. 1964)	11
Gutierrez v. Waterman Steamship Corp., 373 U. S. 206 (1963)	8

PAGE

Knoz v. United States Lines Company, 294 F. 2d 354 (3 C. A. 1961) 6

McAllister v. United States, 348 U. S. 19 (1954) 10

Skovgaard v. The Tungus, 252 F. 2d 14 (3 C. A. 1957) affirmed 358 U. S. 588 (1959) 7

Other Authorities Cited

28 U. S. Code Section 1254(1) 2

33 U. S. Code, Section 901 9

Federal Rules of Civil Procedure—Rule 52(a) 10, 11

Supreme Court of the United States

October Term, 1965

No. 542

BENJAMIN PISANO,

Petitioner,

against

S.S. BENNY SKOU, her engines, boiler, tackle, etc., in rem, and OVE SKOU, D/S OVE SKOU A/S, and D/S af 1937 A/S,

Respondent,

against

JOHN T. CLARK & SON,

Respondent-Impleaded.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, OVE SKOU, D/S OVE SKOU A/S, AND D/S AF 1937 A/S IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York, the Honorable Irving Ben Cooper, U. S. D. J., presiding, dismissing the libel is reported at 220 F. Supp. 901, and is set forth on pages 9-16 of petitioner's appendix.

The opinion of the United States Court of Appeals for the Second Circuit affirming the dismissal of the libel is reported at 346 F. 2d 993, and is set out on pages 19-21 of petitioner's appendix.

Jurisdiction

Petitioner asserts the jurisdiction of this Court under 28 U. S. Code § 1254(1).

Question Presented

We do not believe that the question presented on page 2 of the petition reflects accurately the testimony and proof offered upon the trial. The characterization of the preventer wire without its half-hitch as an "open and obvious hazardous condition" is not reflected in the testimony or the findings of the District Court. It is implicit in the affirming opinion of the Court of Appeals that petitioner's failure to put the necessary half-hitch in the preventer wire would only have been discoverable through a "minute, continuous supervision of every detail" of the stevedoring operation (346 F. 2d 995).

The sole question presented by this petition is whether this Court should undertake to review the findings of fact of the District Court, as unanimously affirmed by the Court of Appeals, that the sole proximate cause of the injuries sustained by petitioner was petitioner's own failure to rig the preventer wire in a proper manner and that petitioner was guilty of 100% contributory negligence.

Statement of Facts

We do not believe that the Statement of Facts set forth on pages 3 and 4 of the petition reflects accurately the testimony and the proof in this suit and would respectfully refer this Court to the opinions of District Judge Cooper and Circuit Judge Moore.

We would suggest that the relevant facts could be summarized as follows:

On the afternoon of July 21, 1960, petitioner was the gangwayman in a gang of longshoremen employed by re-

spondent-impleaded, John T. Clark & Son, to load cargo at No. 5 hatch of m/s Benny Skou, a vessel owned by respondent. Before any cargo was loaded petitioner and three other longshoremen rigged and spotted the ship's booms at that hatch. The vessel was port side to the pier and the port boom at No. 5 hatch was swung out over the pier by petitioner so that it would be in a position to pick up cargo from the pier. After the port boom had been so placed with the use of the rope guy, petitioner proceeded to rig the wire preventer, which was supposed to hold the boom in this position. The rope guy was made up of 2½ inch circumference manila rope having a breaking strain of 4,400 lbs. and a safe working load of 880 lbs. The wire preventer was 2½ inch circumference wire having a breaking strain of 47,600 lbs. and a safe working load of 9,400 lbs., or 4.7 tons.

After the rigging of the booms had been completed, petitioner and the other men in his gang loaded general cargo in one ton drafts without incident for the balance of the afternoon. On the following morning, July 22, 1960, general cargo was loaded in similar drafts for approximately an hour, again without incident. Shortly after 9:00 a.m. the longshoremen at No. 5 hatch lowered the head of the starboard boom so as to permit the loading of aluminum ingots in the after end of the hatch. No changes were made in the rigging of the rope guy or the wire preventer for the port boom. This lowering of the head of the starboard boom had the effect of increasing the interior runner angle between the two wires in the married fall rig, thereby increasing the lateral strain placed upon the wire preventer rigged to the head of the port boom.

The accident occurred when the first draft of aluminum ingots, which weighed approximately two tons, was being burtoned across the deck between the heads of the two booms. It was the function of the port boom's wire preventer to absorb the major portion of the strain and hold the boom in position over the pier. As the draft of alumi-

num ingots came across the deck the boom swung in sharply towards the center line of the vessel, the rope guy for the port boom parted, and the draft of aluminum ingots dropped to the deck and struck petitioner. The wire preventer did *not* part, but ran or rendered through the padeye and turnbuckle to which it had been rigged by petitioner. When the ship's second mate arrived at the scene of the accident he made a close inspection of the wire preventer and concluded that it had been rigged without a half-hitch, and had as a result exerted no restraining force whatsoever. It was obvious to him that the wire preventer had merely followed the movement of the boom.

On his two oral examinations before trial petitioner admitted that he had failed to put a half-hitch in the wire preventer as the last step in the rigging procedure when he personally rigged the preventer. Even petitioner's fact witnesses admitted that the function of a half-hitch in such a rig was to prevent the wire from slipping or rendering when strain was applied. This was corroborated fully by the ship's officer and the two stevedoring experts. With no half-hitch in the wire preventer the burden of opposing the lateral stresses on the boom rested on the rope guy, which as indicated, had only 1/10th the potential strength of the wire preventer.

The District Court found that the intended function of the wire preventer was to absorb the major portion of the lateral stresses on the boom, that the wire preventer had not been able to fulfill this function because it had not been secured properly to the deck of the vessel, and that it was petitioner himself who had rigged the wire preventer in an improper manner. The Court was compelled to conclude that petitioner had brought about his own injuries. Whereas petitioner's improper rigging of the wire preventer created an unseaworthy condition on the vessel, petitioner was found to have been 100% contributorily negligent in that "the manner in which the preventer was

rigged, was the sole proximate cause of the injuries to libelant [petitioner]" (220 F. Supp. 905).

The Court of Appeals affirmed in an unanimous opinion pointing out that petitioner had presented no concrete proof of the cause of the accident, that he had admitted that it was his duty to rig the boom and had done so without taking a half-hitch in the wire preventer, that "there was ample expert testimony to establish that the preventer would not have come loose under the strain of a two-ton load if a half-hitch had been taken", and that the finding of 100% contributory negligence on the part of the petitioner was reasonable and, not having been shown to be clearly erroneous, would have to be sustained. Also sustained was the District Court's conclusion that petitioner's negligent rigging of the preventer was the sole proximate cause of the accident.

ARGUMENT

There Is No Conflict of Decision.

The sole reason asserted by petitioner for a granting of the writ is that "the decision of the Court below appears to be in conflict with"* five decisions of this Honorable Court, three decisions of the United States Court of Appeals for the Third Circuit, and one decision of the Court of Appeals for the Ninth Circuit.

A reading of the decisions cited by petitioner makes it quite obvious why the petition nowhere spells out the details of the alleged conflicts. Where the factual patterns can be considered comparable the cases are on all fours with the decisions below.

Whereas all the cases referred to on page 5 of the petition involved shipboard accidents, the similarity ends

* Page 5 of the petition.

right there. None involved a fact pattern where plaintiff or libelant, as the case might be, was solely responsible for the condition on the basis of which he was claiming against the shipowner.

None of the cases cited involved an unseaworthy condition which, far from being obvious and open, would only have been discoverable through "minute, continuous supervision of every detail" of the stevedore's work as in the instant suit.

The standard of care established by the Court below for a determination as to whether the ship's officers were negligent in having failed to discover petitioner's improper rigging of the wire preventer is identical to the standard of care established by the United States Court of Appeals for the Third Circuit in the cited cases of *Brabazon* v. *Belship Co., Ltd.*, 202 F. 2d 904 (3 C. A. 1953), *Knox* v. *United States Lines Company*, 294 F. 2d 354 (3 C. A. 1961) and *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (3 C. A. 1964).

In *Knox* v. *United States Lines Company, supra,* Circuit Judge Hastie referred to *Brabazon* v. *Belship Co., Ltd., supra,* in defining the standard of care in the following terms (294 F. 2d 357):

> "As our decision in the Brabazon case indicates, the law does not impose a duty upon a ship to provide continuing observation and immediate supervision of work being done by a qualified independent contractor in unloading ordinary cargo. If an obviously hazardous condition had been created by the longshoremen and permitted to exist long enough for normal occasional observation of the course and progress of the work to disclose the existence of the danger to some officer of the ship, then the ship should have been found negligent."

In the later case of *Ferrante* v. *Swedish American Lines, supra,* the Court of Appeals reversed on the issue of

negligence, but only because the District Court had *not* adhered to the foregoing standard of care in determining whether the ship's officers had been negligent.

Nor is petitioner on good ground in asserting that there appears to be conflict between the decision below and the earlier decisions of this Honorable Court. For example, in *Skovgaard* v. *The Tungus,* 252 F. 2d 14 (3 C. A. 1957), affirmed 358 U. S. 588 (1959), Mr. Justice Stewart noted at 358 U. S. 594 that:

> "The majority in the Court of Appeals pointed out that the officers and crew of the *Tungus* remained in overall control of the vessel and that *they were well aware of the existence of the oil spill* and of the danger created by it for approximately an hour before Skovgaard arrived on board." (Emphasis supplied.)

The same distinction would have to be made with respect to the other decisions of this Court cited by petitioner. In all of them, without exception, the unseaworthy condition was known fully to the ship's officers long before the accident occurred. For example, in *Connolly* v. *Weyerhaeuser Steamship Company* v. *Nacirema Operating Co., Inc.,* 236 F. 2d 848 (2 C. A. 1956), later reversed on the issue of indemnity as between the steamship company and Nacirema in 355 U. S. 563 (1958), the United States Court of Appeals pointed out that it was a clear inference from the jury verdict in favor of plaintiff on the issue of negligence that the wooden shelter over the winch at No. 1 hatch had been built in New York before the ship arrived in Boston. This coupled with the testimony of the chief mate that it was his job to see to it that the shelters were taken down before the ship came to Boston made a finding of negligence a foregone conclusion. The defense put forward on behalf of *Weyerhaeuser,* the shipowner, was not that the mate was not under a duty to see that the shack was removed, but rather that the shack had in fact been removed, and could not, therefore, have caused the injury to the

plaintiff in Boston. The jury did not believe the witnesses who testified along these lines, for it concluded that the shack was still in position when plaintiff, the Boston longshoreman, was injured. The facts and circumstances of that case are so patently different from the instant suit that to say that one is in conflict with the other is untenable.

Equally untenable are the claimed conflicts existing between the decision below and *Crumady* v. *Joachim Fisser*, 358 U. S. 423 (1959) and *Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206 (1963), in the first of which the unseaworthy condition was brought about by the negligent setting of a safety device on the winches by the ship's crew, and in the second of which the trial court had held that the shipowner should have known of the defective condition of the bags of cargo carried on the ship, not only because the bags were still leaking while they were on the ship and beans were being spilled throughout the unloading, but also because coopers had come aboard in port in order to repair the torn bags during the course of the discharge. In short, the shipowner and its employees were held to have been on actual notice of the condition which eventually led to the injuries to the longshoreman. Such a fact pattern finds no reflection in the instant suit. The standard of care enunciated by Judge Moore in the decision below is on all fours, not only with the decisions of this Court, but with those of the other circuits as well.

There Is No Important Question of Federal Law.

Petitioner does not appear to claim that there is any important question of federal law requiring decision by this Court. We would agree. The only question posed by this case is whether petitioner should be entitled to recover when his injuries were brought about solely by his own individual failure to carry out his duties in a proper manner. Petitioner had admitted that it was his duty as gang-

wayman of the longshore gang to rig up the boom. He expressed the extent of these duties in the following terms:

> "Well, to see that my boom, the booms and the preventers, the guides [guys], and everything were secured right, to see that no one gets hurt, see if my cargo is hooked up the right way, and to give signals; that's it" (62b).*

Petitioner admitted that he was the boss of the deck men in his longshore gang (62b). Petitioner admitted on his two oral examinations before trial that he rigged the wire preventer in question, and admitted further that he had failed to take a half-hitch in the wire preventer as the final step in the rigging. Obviously, petitioner failed in his duty to see to it that the preventer was "secured right". Ironically enough, petitioner himself was the one who sustained an injury as a result of this improper rigging. Since the failure of petitioner himself to put the necessary half-hitch in the wire preventer was found both by the District Court and by the Court of Appeals to be the sole, proximate cause of petitioner's injuries, it is hard to understand how petitioner could be entitled to recover monies in a court of law over and above the amounts to which he would be entitled under the terms of the Longshoremen's & Harbor Workers' Compensation Act (33 U. S. Code, Section 901, *et seq.*).

The Decision Below Is Clearly Correct.

In order to upset the decisions below, petitioner would have to establish that the following findings of the District Court (unanimously affirmed by the Court of Appeals) were not so:

---

* Numbers followed by the letter (b) refer to pages in respondent-petitioner-appellee's appendix in the United States Court of Appeals for the Second Circuit.

1. That it was part of petitioner's duties to rig the wire preventer.

2. That petitioner did in fact rig the wire preventer.

3. That in rigging the preventer petitioner failed to take a half-hitch in the wire as the last step in the rigging.

4. That the sole proximate cause of the injuries sustained by petitioner was the manner in which the preventer had been rigged by petitioner himself.

5. That petitioner was guilty of 100% contributory negligence in having brought about his own injuries.

Petitioner has, in effect, taken upon himself the burden of establishing that the findings of the courts below were clearly erroneous. At the risk of going over too-familiar ground, we would refer this Honorable Court to the decision of *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), where at 348 U. S. 20 it was stated:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure."

The pertinent portion of Rule 52(a) of the Federal Rules of Civil Procedure reads as follows:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

It is perhaps unnecessary to note that the *McAllister* rule has full vitality today. The United States Court of

Appeals for the Second Circuit was most certainly aware that it was not involved in a trial *de novo,* since it noted that the District Court's finding of 100% contributory negligence had not been shown to be clearly erroneous, and cited its own most recent decision on the point, *Gruja* v. *United States Lines Company,* 337 F. 2d 375 (2 C. A. 1964) where the Court stated, while citing *McAllister* v. *United States, supra,* that since it appeared that the District Court's assessment of credibility and resultant findings of fact were not clearly erroneous within the meaning of Rule 52 of the Federal Rules of Civil Procedure, and since there was substantial evidence in the record to support such findings, the decision below would have to be affirmed, especially since an Appellate Court should not lightly substitute its judgment for that of the trier of the fact

For that matter, the testimony and the proof in this case left virtually no room for the Court of Appeals to disagree with the findings and conclusions of the Trial Court. Perhaps one of the most surprising aspects of the entire case is that the testimony of the witnesses, whether called by petitioner or by the other parties to the suit, was so uniform. There was virtually no disagreement as to the manner in which the wire preventer had been rigged, no disagreement as to the occurrence of the accident, no disagreement as to the necessity for a half-hitch in the rig, no disagreement that petitioner had failed to put a half-hitch in the wire and, except for fine semantic distinctions, no disagreement among the fact and expert witnesses as to the intended functions of the various elements of the rigging.

The Trial Court stated that the theories of liability advanced by petitioner were not sustained by the facts, and that there were no tangible findings to support petitioner's claim that his injuries were caused by a defect in the rope guy. The Court of Appeals agreed, stating that the trial record revealed that petitioner "presented no concrete proof of the cause of the accident."

The proof in the case leaves no room for any conclusion as to the cause of the accident other than that arrived at by the Courts below.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

J. Ward O'Neill,
David P. H. Watson,
Counsel for Respondent, Ove Skou, D/S Ove Skou A/S, and D/S af 1937 A/S,
80 Broad Street,
New York, N. Y. 10004

Robert K. Marzik,
of Counsel.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 14 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1965

No. 542

BENJAMIN PISANO,

Petitioner,

against

S. S. BENNY SKOU, her engines, boiler, tackle, etc., in rem, and OVE SKOU, D/S OVE SKOU, A/S and D/S af 1937 A/S,

Respondent,

against

JOHN T. CLARK & SON,

Respondent-Impleaded.

PETITIONER'S REPLY BRIEF

GOLDSTEIN & STERENFELD,
Counsel for Petitioner,
50 Broadway,
New York, New York 10004.

ALVIN P. APFELBERG,
of Counsel.

HARVEY GOLDSTEIN,
on the Brief.